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In the Supreme Court of the United States

OCTOBER TERM, 1977

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

MCI TELECOMMUNICATIONS CORP., ET AL., RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DANIEL M. ARMSTRONG,
Associate General Counsel,
JOHN E. INGLE,
Counsel.
Federal Communications Commission,
Washington, D.C. 20554
(202) 632-7112.

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MCI TELECOMMUNICATIONS CORP., ET AL, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Federal Communications Commission respectfully asks this Court to issue a writ of certiorari to review the judgment of the Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A) [1] is not yet reported. The decision of the Federal Communications Commission (App. B) is reported at 60 FCC 2d 25.

JURISDICTION

The court of appeals entered judgment on July 28, 1977. That court stayed its mandate by order dated August 22, 1977 (App. C), and this petition for certiorari is filed within the time allowed by the stay of mandate order. Rule 41(b) of the Federal Rules of Appellate Procedure. This Court has jurisdiction by virtue of 28 U.S.C. § 1254(1).

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[1] The appendices are under separate cover.

QUESTION PRESENTED

The court of appeals held in this case that the Commission had erred in ordering MCI Telecommunications Corp., a specialized communications common carrier, to cease and desist from offering a service called "Execunet" which the Commission had found to be essentially identical to ordinary long distance telephone service.[2] The Commission had based its order on its finding that Execunet was not a private line service within the scope of MCI's limited authorization, but that in all essential respects it was the same as ordinary long distance telephone service which MCI had no authority to provide. The court of appeals reversed on its own finding that the Commission had never made the requisite public interest findings that would justify service limitations on MCI's authorizations. Accordingly, the court of appeals held that MCI was free to provide Execunet and any other services for which its facilities are adequate, and that its authorizations were not limited in any way, despite the fact that the Commission had not considered whether unlimited authorization would serve the public convenience and necessity within the meaning of 47 U.S.C. § 214.

The question for the court is:

Whether the court of appeals erred in holding that specialized common carriers such as MCI have authority to provide ordinary long distance telephone service, despite the fact that the FCC, with express approval of the Ninth and Third Circuits, had consistently regarded its specialized common carrier policy as limited to private line services and had not made the requisite statutory finding that competition in ordinary long distance service would serve the public convenience and necessity.

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[2] A subscriber to Execunet can call from any telephone in the city of origin to any telephone in any other city in the MCI network, using MCI's intercity circuits in connection with local exchanges belonging to the telephone companies. Subscribers are billed for each call on the basis of time and distance, subject to a monthly minimum. (App. A, p. 4a & n.3; App. B, p. 33a n.1.)

STATUTES INVOLVED

Sections 1, 4, 204, 205, 208, 214, 303, 308 and 309 of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§ 151–609, are set forth in relevant part in App. D.

STATEMENT

Section 214 of the Communications Act empowers the FCC to authorize construction and operation of interstate communications facilities and thus to control entry into communications markets.[3] The statute presupposes that unlimited entry will not always and necessarily serve the public interest. The FCC must consider in discrete instances or in general policymaking whether new competitive entry will further the statutory public interest goal of efficient service with adequate facilities at reasonable charges. 47 U.S.C. §§ 151, 214(a).[4] When faced with an application, the FCC may issue the certificate "as applied for," or deny it, or issue it in part or subject to "such terms and conditions as in its judgment the public convenience and necessity may require." 47 U.S.C. § 214(c). The Commission may not grant the authorization at all, however, unless it can certify that the "public convenience and necessity" require construction and operation of the proposed facility. 47 U.S.C. § 214(a).

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[3] Section 214 was patterned after Section 1(18–22) of the Act to Regulate Commerce as amended by the Transportation Act of 1920, 41 Stat. 456 (recodified as 49 U.S.C. § 1(18)). See S. Report No. 781, 73d Cong., 2d Sess. 5 (1934); H.R. Report No. 1850, 73d Cong., 2d Sess. 6 (1934). The purpose of those provisions is "to prevent interstate carriers from weakening themselves by constructing or operating superfluous lines, and to protect them from being weakened by another carrier's operating in interstate commerce a competing line not required in the public interest." *Texas & N.O.R. Co.* v. *Northside Belt Ry. Co.*, 276 U.S. 475, 479 (1928). Similar certification statutes appear in other regulatory acts. *E.g.*, 49 U.S.C. § 307 (motor carriers); 49 U.S.C. 1371 (air carriers)

[4] See *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953); *Washington Utilities & Transp. Comm.* v. *FCC*, 513 F. 2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975); *Hawaiian Telephone Co.* v. *FCC*, 498 F. 2d 771 (D.C. Cir. 1974).

Once a carrier has obtained certification, it may offer service consistent with its certificate by filing tariff schedules, which describe the regulations, practices and charges governing the service. 47 U.S.C. § 203. A tariff filing may not broaden the scope of certification, however, and the FCC may reject any tariff which purports to offer services that are beyond the authority of a limited service carrier.[5]

The court of appeals in this case held that the FCC had incorrectly construed Section 214 as empowering it to limit certificates to the services proposed by the carrier in its application. According to the court of appeals, the FCC may grant a limited authorization only if it has looked beyond the applicant's proposed services and made an "affirmative determination of public interest need for restrictions." (App. A, pp. 24a–29a.) Because the FCC, in adopting its specialized common carrier policy[6] and in granting specific applications pursuant to that policy, had not made such an "affirmative determination," the court of appeals found that the FCC had not limited the specialized carriers' certificates. With unlimited authorizations, the court said that MCI was free to offer any service its facilities could provide merely by filing tariffs. Accordingly, the court reversed the FCC's decision to require MCI, a specialized carrier, to stop offering Execunet and to remain within what the agency had regarded as the carrier's sphere of authorized services.

The court's decision in effect removes service limitations on the specialized carriers—even though the FCC never has weighed the public interest benefits and detriments of competition outside the area of private line services and has not

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[5] See, *e.g.*, *Press Wireless, Inc.*, 25 FCC 1466 (1958), *aff'd sub nom. Press Wireless, Inc.* v. *FCC*, 264 F. 2d 372 (D.C. Cir. 1959), *Cf. ITT World Comm., Inc.* v. *FCC*, 555 F. 2d 1125 (2d Cir. 1977) (recognizing the need for further authorization under Section 214 to remove restrictions on AT&T's use of international cable and satellite facilities); *Flying Tiger Line* v. *C.A.B.*, 204 F. 2d 404 (D.C. Cir. 1953); *W. J. Dillner Transfer Co.* v. *United States*, 214 F. Supp. 941 (W. D. Penn. 1963).

[6] *Specialized Common Carrier Services* (Docket No. 18920), 29 FCC 2d 870, 31 FCC 2d 1106 (1971), *aff'd sub nom. Washington Util. & Transp. Comm.* v. *FCC*, 513 F. 2d 1142.

warranted that unlimited competition will serve the public interest. The decision leaves in doubt the scope of authority under certificates and licenses granted to domestic satellite carriers,[7] "value added" carriers,[8] and a number of categories of miscellaneous carriers with similarly limited grants.[9] The decision also imposes on the Commission a new interpretation of the certification process under Section 214 which will require scrutiny of applications beyond the proposed services and which may bring into question the validity of numerous grants made under the agency's own interpretation of that statute.

A. THE INDUSTRY STRUCTURE AND SPECIALIZED COMMON CARRIERS

Communications carriers render telephone service that may be divided, for purposes of this case, into two broad categories: (1) message telecommunications service (MTS), which includes ordinary long distance toll service and wide area telecommunications service (WATS); and (2) private line service, also known as leased line service.[10] Long distance public toll service traditionally has been a *de facto* monopoly offering, just as local exchange telephone service normally is provided by a single local carrier. The interstate public MTS network, comprising the interconnected local exchanges of American Telephone & Telegraph Company operating companies and some 1,600 independent telephone companies, historically has been

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[7] *Domestic Communication-Satellite Facilities*, 35 FCC 2d 844, 38 FCC 2d 665 (1972).

[8] *E.g.*, *Packet Communications, Inc.*, 43 FCC 2d 922 (1973); *Graphnet Systems, Inc.*, 44 FCC 2d 800 (1974); *Telenet Communications, Inc.*, 46 FCC 2d 680 (1974). See also *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, 60 FCC 2d 261 (1976), 62 FCC 2d 588 (1977), *review pending sub nom. American Tel. & Tel. Co.* v. *FCC*, No. 77–4057, Second Circuit.

[9] *E.g.*, 47 C.F.R. 21.500–523 (domestic public land mobile radio service); 47 C.F.R. 21.800–809 (local television transmission service); 47 C.F.R. 21.900–908 (multipoint distribution service).

[10] See, *e.g.*, M. Irwin, *The Telecommunications Industry* 24–25 (1971).

the sole source of long distance public voice telephone service.[11]

Private line service, by contrast, has been subject to some degree of competition for many years.[12] Private line service is just what the name implies: a service in which the customer buys the privilege of using facilities that are dedicated in some meaningful respect to his personal use, always available to him, directly connecting the customer's premises with another point (or a number of other points) selected in advance, capable of instant connection without the need for dialing, and tariffed at a flat periodic rate rather than according to use.[13] Private line service attracts customers, primarily business or governmental organizations, which have a substantial need for communications between or among limited numbers of fixed locations.

In recent years, the Commission has found that the demand for more and different private line services exceeds the capacity and innovative efforts of the existing carriers to satisfy it. The gap between demand and supply does not necessarily reflect indifference or incompetence on the part of the carriers. Rather, the telephone companies have spent their energies and resources keeping up with the burgeoning demand for ordinary public services, and simply have not remained abreast of the more specialized demand for data and other nonvoice services

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[11] AT&T furnishes virtually all the intercity lines and circuits connecting the local exchanges into a single interstate MTS network.

[12] See *Wilson & Co.* v. *FCC*, 335 F. 2d 788 (7th Cir. 1964), *remanded for consent settlement*, 382 U.S. 454 (1966), which recognized the long standing competition between AT&T and the Western Union Telegraph Company in some private line services. More recently, the District of Columbia and Second Circuits have noticed the distinction between AT&T's "competitive" private line services and its "monopoly" MTS services. *Nader* v. *FCC*, 520 F. 2d 182, 187 (D.C. Cir. 1975); *American Tel. & Tel. Co.* v. *FCC*, 487 F. 2d 864, 868 (2d Cir. 1973).

[13] App. B, pp. 61a–64a. See also *Private Line Cases*, 34 FCC 244, 249–50 (1961) (Initial Decision), *aff'd*, 34 FCC 217 (1963), *aff'd sub nom. Wilson & Co.* v. *FCC*, 335 F. 2d 788, 792. Private line services need not have all these characteristics, and some of them do not. See *Bell Telephone Co. of Penn.* v. *FCC*, 503 F. 2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975).

and for customized private voice services.[14] Competition has been authorized in private voice as well as data communications, in the expectation that new entrants would satisfy the unmet demand and provide innovation in technology and marketing.

The Commission granted its first specialized carrier authorization to MCI in 1969 after six years of proceedings, authorizing MCI to provide private line services between Chicago and St. Louis.[15] Hundreds of similar applications from MCI and other prospective specialized carriers followed the MCI grant. Rather than refer each application to a separate hearing, at

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[14] The Commission first perceived the need for new companies capable of providing flexible, tailored private line services during its Computer Inquiry, which began in 1966. *Customer Interconnection*, 61 FCC 2d 766, 781–82 (1976). The Computer Inquiry resulted in rules governing the participation of common carriers in data processing activities. *Computer Inquiry*, 28 FCC 2d 291 (1970), *aff'd in part sub nom. GTE Service Corp.* v. *FCC*, 474 F. 2d 724 (2d Cir. 1973). It had recognized the need for more private communications service several years earlier, however, when it made radio frequencies available for private microwave systems for companies and other organizations with sufficient need for point-to-point service to justify building their own communications systems. *Allocation of Frequencies in the Bands above 890 Mc.*, 27 FCC 359 (1959), 29 FCC 825 (1960). These frequencies may not be used for common carriage, but they provide indirect competition to established private line services.

[15] *Microwave Communications, Inc.*, 18 FCC 2d 953 (1969), 21 FCC 2d 190 (1970). The FCC's hearing designation order on the MCI applications focused on the services MCI proposed, directing the inquiry to such issues as the nature and extent of the facilities and services, the communities and entities which would be expected to receive the services, the public need for the services, and the benefits and detriments expected from authorizing the facilities and services. *Microwave Communications, Inc.*, 31 Fed. Reg. 2666, 2668 (1966). After considering these issues, the Commission made what it regarded as a limited grant of authority to MCI for the Chicago-St. Louis route, authorizing only the services MCI had proposed. The hearing examiner focused on the limited service in his initial decision:

"MCI does not propose a message toll or exchange telephone service, but it will offer its channels to subscribers for interoffice communications. Subscribers would not be supposed to communicate with each other over MCI's facilities."

18 FCC 2d at 982.

significant cost in time and resources, the Commission initiated a rulemaking proceeding to resolve the general policy question that was common to all the applications: whether the public interest would be served by a general policy of open entry into the specialized communications field. *Specialized Common Carrier Services* (Docket No. 18920), 24 FCC 2d 318 (1970).

In its notice of inquiry and proposed rulemaking, the Commission noted that the applicants proposed only "specialized private line services," 24 FCC 2d at 324, and limited its public interest inquiry to that segment of the communications market, *id.* at 335–38. The FCC disclaimed any intention, in its notice, of authorizing direct competition to MTS and WATS, pointing out that "none of the applicants proposes to provide this type of service, and we see no reason to expect any undesirable effects upon these services." *Id.* at 335.

After extensive proceedings, the Commission concluded that there was a need for the proposed services, that new entry into this limited market would produce specific public benefits and would have little adverse impact on the established carriers, and that a general policy of open entry into the interstate private line market would serve the public interest, convenience and necessity. The FCC specifically rejected claims by the established carriers that new entry would have an adverse impact on their revenues and therefore on their service to the public. The agency found that the impact would be minimal because of the limited scope of the proposed services. The FCC relied upon the fact that the great bulk of the established carriers' revenues came from long distance service and WATS, which the applicants did not propose to offer. *Specialized Common Carrier Services*, 29 FCC 2d 870, 31 FCC 2d 1106 (1971).

The Ninth Circuit unanimously affirmed. *Washington Util. & Transp. Comm.* v. *FCC*, 513 F. 2d 1142. That court interpreted the Commission's policy broadly as approving entry into the entire field of private line services, but not public telephone services:

> The business involved is that of providing specialized private or leased line communications services through

> microwave transmission facilities, as distinguished from public exchange and long distance toll telephone service.

513 F. 2d at 1155. The Ninth Circuit also found rulemaking to be a lawful and appropriate means of setting policies to govern individual applications. 513 F. 2d at 1160–65. In particular, that court said:

> Though the Commission said it would pass separately upon the merits of each pending application, presumably the rule would govern individual cases. That is its function.

Id. at 1164.

The Commission has consistently regarded the policy as authorizing competition in the full range of private line services, but not in public services such as long distance toll calling. It has rejected repeated efforts by the established carriers to *constrict* the policy. See, *e.g. United States Transmission Systems, Inc.*, 48 FCC 2d 859 (1974), *aff'd sub nom. American Tel. & Tel. Co.* v. *FCC*, 539 F. 2d 767 (D.C. Cir. 1976); [16] *Bell System Tariff Offerings*, 46 FCC 2d 413 (1974), *aff'd sub nom. Bell Tel. Co. of Penn.* v. *FCC*, 503 F. 2d 1250; [17] *Specialized Common Carriers*, 44 FCC 2d 467 (1973), 50 FCC 2d 416 (1974) (reaffirming the policy in the face of an AT&T petition for a moratorium on further grants pending a review by the FCC of the effects of competition). But it has never *expanded* the policy to authorize competition in public long distance telephone service, nor has it been asked to do so.

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[16] The D.C. Circuit stated in the *AT&T* case:

"The Commission decided broadly that the public interest, convenience, and necessity would be served by permitting specialized common carriers to provide a full range of private line communications services in direct competition with the established carriers * * *."

539 F. 2d at 773–74.

[17] The Third Circuit held in *Bell Tel. Co. of Penn.* that "the Commission intended to authorize the new carriers to provide all elements of private line services * * *."

B. THE EXECUNET MATTER

After several years of offering private line services in accordance with its authorizations, MCI on September 11, 1974, filed tariff revisions to broaden its service offerings by providing "metered use service" as an additional option to its full-time and part-time private line services. The tariff did not mention Execunet by name and did not describe the service. Members of the FCC staff met several times with MCI personnel to discuss the meaning of the revisions and to seek clarification of what was being offered. The tariff became effective by operation of law on October 10, 1974,[18] even though FCC staff members still were seeking clarification of the tariff and the services it purported to describe. (App. B, pp. 38a–39a.)

MCI began to sell Execunet in January 1975. (App. B, p. 39a.)[19] Several months later, AT&T became aware of the nature of the service and brought the matter to the Commission's attention, first orally[20] and then in a written complaint. After two rounds of investigation[21] and after oral argument that was open to all interested parties including other specialized car-

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[18] 47 U.S.C. §§ 203(b), 204.

[19] Although it described Execunet as a new private line network, MCI stated in promotional material that users could save substantially on "long distance telephone service" and "intercity telephone calls." Supplemental Appendix 189–93, filed in court of appeals. In one brochure, MCI stated:

"MCI is the first company offering intercity telephone service in competition with the telephone company."

Supp. App. 365, See also *id.* at 216–20.

[20] MCI made an issue of the oral complaint at the Commission and in the court of appeals. That issue is not in the case at this point, however, for it was not a factor in the court of appeals decision.

[21] The FCC first decided the matter adversely to MCI in a letter order released July 2, 1975, after receiving three letters setting forth MCI's views. (App. B, pp. 99a–104a.) In that order, the FCC rejected MCI's tariff insofar as it offered Execunet, on grounds that Execunet was an unauthorized service. MCI sought review of the letter order, and, in an application for judicial stay, made arguments that the FCC had not had an opportunity to address in its letter order. On motion of the FCC, the court of appeals held the review proceeding in abeyance to allow the FCC to conduct further proceedings in which it would consider MCI's arguments. (App. A, p. 8a.)

riers, the FCC issued its final decision on July 13, 1976, finding that Execunet was outside MCI's limited authority and requiring the carrier to cease and desist from offering it. (App. B, pp. 89a–90a.)

Analyzing its own specialized common carrier policy, the Commission restated its consistent position that it had authorized competition "only in the limited portion of AT&T's and Western Union's business represented by private line services." (App. B, p. 51a.) Execunet, the Commission found on the basis of undisputed descriptions of the service, "has all the essential characteristics of MTS or WATS" and "does not have the essential characteristics of private line service * * *." (App. B, p. 64a.)[22] Accordingly, since Execunet was a service that MCI had no authority to provide, the FCC directed it to cease offering the service.

C. THE DECISION BELOW

The court of appeals reversed. While it agreed that the FCC has authority to limit or condition certificates and licenses (App. A, pp. 23a–24a), it found that the FCC had not done so either in its *Specialized Common Carrier Services* proceeding or in subsequent grants of specific certificates to MCI.[23] The court conceded that the FCC "perhaps did not intend to open

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[22] For a brief description of Execunet, see note 2, *supra*, and appendix material cited there. For a schematic diagram of Execunet as compared with ordinary long distance service, see Supplemental Appendix 1027–28, filed in court of appeals.

[23] While many of MCI's certificates and licenses contain express statements to the effect that they are limited to authorized private line services and include by specific reference the limitations of the *Specialized Common Carrier Services* decision, not all of them do. (App. B, p. 49a.) All of the grants, however, depend upon the *Specialized Common Carrier Services* proceeding for validity, because the FCC has not made independent findings with respect to such grants that the public convenience and necessity required certification. 47 U.S.C. § 214(a). The FCC relies upon the *Specialized Common Carrier Services* decision as the source of the rule limiting MCI and other specialized carriers to private line services. The policy adopted in that proceeding governs individual grants. "That is its function." *Washington Util. & Transp. Comm.* v. *FCC*, 513 F. 2d at 1164.

the field of common carrier communications generally" (App. A, p. 28a)[24] and thus might have regarded the specialized carriers as limited to private line services. But it held that the Commission "cannot impose any such restriction unless it has affirmatively determined that 'the public convenience and necessity [so] require.' " (App. A, p. 24a.)

The court rejected the FCC's interpretation of Section 214 (a), which assumes that the agency may consider applications on the basis of the services proposed, limit its analysis to the public interest in receiving those services from the applicant, and grant authority in appropriate situations that goes no further than the services proposed and considered. Instead, the court of appeals would require the agency to make an additional public interest finding—after it has found justification for granting the certificate—that the applicant may not offer other unknown and unknowable services. The court thus would not allow the agency merely to consider the application before it, but would require analysis of matters of conjecture, lest the agency inadvertently introduce competition in areas it "did not perhaps intended to open * * *." (App. A, p. 28a)[25]

On motion by the FCC and by intervenors AT&T and the United States Independent Telephone Ass'n, the court of appeals stayed its mandate until September 19, 1977. (App. C.) MCI continues to provide Execunet to its existing customers pursuant to a stay entered by the court of appeals. (App. A, p. 8a n. 18.)

REASONS FOR GRANTING THE WRIT

The Court should grant the petition for writ of certiorari because (1) the decision below conflicts directly with decisions of the Ninth and Third Circuits construing the scope of authorized competition by specialized common carriers, and conflicts in principle with decisions of this and other courts construing Section 214 and other certification statutes; (2) the decision and the principle it establishes are important be-

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[24] See also App. A, p. 26a.

[25] The court of appeals did not decide that Execunet was in fact a private line service. (App. A, p. 26a.)

cause of the fundamental changes and disruption they may cause in the communications industry and the significant impact they will have on the FCC's common carrier certification process; and (3) the decision is wrong as a matter of statutory construction, in that it ignores the plain language of Section 214(a) and the FCC's consistent application of that statute over the years.

A. CONFLICT WITH OTHER DECISIONS

The decision below is irreconcilable with decisions of the Ninth and Third Circuits directly construing the FCC policy of limited specialized common carrier competition. The Ninth Circuit, in *Washington Util. & Transp. Comm.* v. *FCC*, 513 F. 2d 1142, affirmed the *Specialized Common Carrier Services* decision on direct review. A necessary premise of that court's decision was its finding that the FCC had authorized competition only in private line services:

> The business involved is that of providing specialized private or leased line communication services through microwave transmission facilities, as distinguished from public exchange and long distance toll telephone service.

513 F. 2d at 1155. This was no mere "general description of the services proposed," as the court of appeals in this case suggests. (App. A, p. 25a n. 59.) Rather, this finding was an essential premise for the analysis the Ninth Circuit performed in affirming the policy.

That court found that the FCC had lawfully authorized competition, under the standard articulated in *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953), because the FCC had found and warranted that specific public interest benefits would result from "entry of new carriers in the *specialized communications field* * * *." 513 F. 2d at 1159 (emphasis added).[26] Since the FCC had not warranted

[26] See also 513 F. 2d at 1156, 1158–60, 1165. The Ninth Circuit summarized, in affirming the adoption of policy in rulemaking:

benefits from competition outside the area of private line services, the Ninth Circuit might have been unable to affirm a broader policy on the record of that proceeding. See *Federal Comm. Comm.* v. *RCA Communications, Inc.*, 346 U.S. at 92–97. Further, that court found that the FCC had adequately appraised the adverse effects of competition on the established carriers, citing to the agency's analysis of the very small part of the total market that would be vulnerable to private line competition. 513 F. 2d at 1159, citing to 29 FCC 2d at 910–14.[27] At the urging of the Department of Justice and other parties supporting limited service competition, the FCC had rejected claims by the established carriers that new entry would require higher rates for public services such as MTS. The court found that the FCC had properly considered only that part of the established carriers' revenues that would be jeopardized by the services proposed in the specialized carriers' applications. If the effect of the FCC's policy had been to authorize unlimited competition, its analysis of impact on the established carriers' revenues and thus on rates for MTS might not have been sufficient to satisfy the Ninth Circuit under the *RCA Communications* test. 513 F. 2d at 1151. Plainly, the findings that specialized carriers were limited to private line services was essential to the Ninth Circuit's holding, and the D.C. Circuit's finding to the contrary in the Execunet case is in direct conflict.

In *Bell Tel. Co. of Penn.* v. *FCC*, 503 F. 2d 1250, the Third Circuit directly considered the scope of MCI's authorizations and, like the Ninth Circuit, concluded that the FCC had certified the specialized carriers to compete in the "full field of private line services." 503 F. 2d at 1270.[28] The ultimate question for that court was whether MCI was entitled to interconnection with AT&T for the provision of certain services which MCI

"[T]he Commission * * * may determine that competition in the furnishing of a *class of regulated service* will lead not to poorer but to better service * * *. We have sustained the Commission's determination to this effect *with respect to the specialized communications field* as a whole.

513 F. 2d at 1166 (emphasis added).

[27] See also 513 F. 2d at 1156 n. 21.

[28] See also, *e.g.*, 503 F. 2d at 1259–62, 1269, 1273.

contended were private line services and AT&T claimed were not. In the FCC's view, MCI was entitled to interconnection for purposes of providing all its authorized services (*i.e.*, all private line services). The task for the Third Circuit was to determine (1) the scope of MCI's authority, and (2) whether these services were within that scope and entitled to interconnection. The court concluded that MCI and the other specialized carriers had authority to offer the full range of private line services; that the services in question were private line services; and that MCI was entitled to interconnection.

As in the Ninth Circuit decision, the finding of limitation to private line services was essential to the Third Circuit decision. If MCI's grants were unlimited, as the D.C. Circuit has held in this case, there would have been no need for the Third Circuit to inquire whether those specific services were authorized. The Third Circuit also considered whether the interconnection requirement was overbroad and concluded that it was not, because it had to be read in the context of the *Specialized Common Carrier Services* decision and was limited thereby to private line services. 503 F. 2d at 1273–74.[29] The Third Circuit, like the Ninth Circuit, thus has construed the scope of specialized carrier authorization as an essential part of a decision; and its construction conflicts with that of the court below.[30] [31]

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[29] The Third Circuit also considered the validity of the underlying *Specialized Common Carrier Services* decision, which had not yet been affirmed by the Ninth Circuit, and conducted essentially the same analysis under this Court's *RCA Communications* decision that the Ninth Circuit later conducted. The Third Circuit similarly relied upon the FCC's findings and warrant of public benefits from the proposed private line services and upon the impact analysis that was limited to private line competition. 503 F. 2d at 1259–63, 1269–74.

[30] See also *American Tel. & Tel. Co.* v. *FCC*, *supra*, 539 F. 2d 767; *MCI Communications Corp.* v. *AT&T*, 369 F. Supp. 1004 (E.D. Penn. 1973), *vacated other grounds*, 496 F. 2d 214 (3d Cir. 1974).

[31] The decision below also conflicts (1) with consistent FCC interpretations of its own policy, *e.g.*, *Customer Interconnection*, 61 FCC 2d 766, 781–83; (2) with representations made by the FCC and the United States in oppositions to certiorari filed in this Court, *e.g.*, *American Tel. & Tel. Co.* v. *FCC*, No. 74–1229, Brief for Respondents in Opposition; *National Ass'n of*

The decision below also conflicts in principle with decisions of this and other courts recognizing that certifying agencies can properly limit their consideration of applications to the services proposed, and that they may commit legal error if they try to grant authority that has not been requested. This Court has held that if an agency permits a certificate holder to operate beyond the terms of its grant, "He who was in substance a highly specialized carrier * * * would be treated as a carrier of general commodities * * *." *Noble* v. *United States*, 319 U.S. 88, 92 (1943).[32] More recently, this Court remanded a case to a three-judge district court to determine the lawfulness of a certificate to the extent that it exceeded the scope of the application. *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 299–300 (1974).[33] The court of appeals, in reversing agency action that

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Reg. Util. Comm'rs v. *FCC*, No. 74–1550, Brief for the Federal Respondents in Opposition; (3) with views of the congressional oversight committees, *e.g.*, *Agenda for Oversight* (Committee Print), 94th Cong., 2d Sess., prepared by the staff for use of the Subcommittee on Communications of the House Committee on Interstate and Foreign Commerce, April 26, 1976; and (4) with legal commentary, *e.g.*, Note, Competition in the Telephone Equipment Industry, 86 Yale L.J. 538 n.1 (1977); Note, Resale and Sharing of Private Line Communications Services, 61 Va. L. Rev. 679, 681–95 (1975).

[32] See also, *Crescent Express Lines* v. *U.S.* 320 U.S. 401 (1943); *Capitol Airways, Inc.* v. *C.A.B.*, 292 F. 2d 755 (D.C. Cir. 1961); *Civil Aeronautics Board* v. *American Air Transport*, 201 F. 2d 189, 193–94 (D.C. Cir.), *certificate dismissed*, 344 U.S. 4 (1952); *Brady Transfer & Storage Co.* v. *U.S.*, 80 F. Supp. 110 (S.D. Iowa), *aff'd*, 335 U.S. 875 (1948). Compare *United States* v. *Seatrain Lines*, 329 U.S. 424 (1947).

[33] On remand, the district court set aside the grant of "excess authority that was and is not supported by any evidence of public need and in regard to which there was no finding of any public need." *Arkansas-Best Freight System, Inc.* v. *U.S.*, 399 F. Supp. 157, 168 (W.D. Ark, 1975), *aff'd*, 425 U.S. 901 (1976). To the extent that MCI offers services outside the rubric of private lines, its authority also lacks supporting evidence and findings of public need. The district court in *Arkansas-Best* also found that authorizations beyond the scope of the application raised serious questions of notice to competing carriers and others who might oppose the application. See also *Civil Aeronautics Board* v. *State Airlines, Inc.*, 338 U.S. 572, 576, 578–81 (1950). Notice questions would arise also in a grant of unlimited authorization to specialized carriers after a proceeding expressly limited to private line service applications. Compare 47 C.F.R. §§ 63.01(e); 63.52.

is consistent with the principle espoused in these cases, has brought itself into conflict with that principle.

Finally, the decision below conflicts in principle with the rule of *RCA Communications, supra,* 346 U.S. 86, and *Hawaiian Tel. Co.* v. *FCC, supra,* 498 F. 2d 771. Those cases stand for the proposition that the FCC, in considering whether to grant Section 214 authorization for entry into a communications market, "must start from the situation as it then exists," analyze the need for additional service, and determine whether and to whom it should grant a certificate for the proposed service. 498 F. 2d at 776. Under that rule, the FCC may not assume that competition will serve the public interest, but must "warrant" that benefits will flow from a particular authorization. If it cannot so warrant, it may not depart from "the situation as it then exists."

The D.C. Circuit in the Execunet decision would require entry by MCI and other specialized carriers into services the FCC never has analyzed and as to which it has no basis for warranting that competition will "serve some beneficial purpose such as maintaining good service and improving it." 346 U.S. at 97. Such entry would conflict with the venerable principle of *RCA Communications*—a principle established in construction of the very statute that the D.C. Circuit has erroneously construed in this case.

B. IMPORTANCE OF THE CASE

This case has significance far beyond the question whether MCI can offer a particular communications service called Execunet. The decision leaves in doubt the scope of authorized competition in interstate common carrier communications. If it stands, the decision will expand that scope to services which the FCC had not intended to reach in its decisions up to now and as to which the Commission has not made the statutorily required findings of public convenience and necessity. 47 U.S.C. § 214(a).

The Commission has not declared certain areas, such as MTS and WATS, to be free for all time from competition.[34] But it has represented to the courts, to Congress, to the public, and to all the carriers concerned that its decisions so far have not opened ordinary long distance service to competitive carriers such as MCI. The decision below would work fundamental changes in the Commission's policy by, in effect, eliminating the limitations on the area in which the Commission has found that competition will serve the public interest.

The decision also casts doubt upon the validity of the competitive policies on which MCI and other specialized carriers depend for their existence, and upon their grants of authority pursuant to the policy. The Ninth and Third Circuits affirmed that policy on the essential finding—correct, in our view—that the FCC had lawfully limited it to private line services. This Court two times has denied certiorari presumably on the same premise.[35] The FCC has made numerous grants in application of the policy as affirmed. If this decision stands, there may be relitigation before the FCC and in the courts of issues bearing on competition that the Commission believes were properly resolved in some 14 years of agency and judicial proceedings.[36] This relitigation and the uncertainty it would engender would disrupt and might change fundamentally the structure of the industry—perhaps, ironically, to the detriment

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[34] The suggestion in the opinion below that the FCC has "granted AT&T a *de jure* monopoly over MTS and WATS" (App. A, pp. 15a & n. 39, 29a–30a) has no foundation in the Execunet decision or any other FCC action. The FCC relied in this case not upon anything that had or had not been granted to *AT&T*, but upon the nature and extent of authorization to *MCI*. The established telephone companies have a *de facto* monopoly in MTS and WATS, as the courts often have recognized. *E.g.*, *Nader* v. *FCC*, *supra*, 520 F. 2d at 187; *Amer. Tel. & Tel. Co.* v. *FCC*, *supra*, 487 F. 2d at 868.

[35] *Amer. Tel. & Tel. Co.* v. *FCC*, 422 U.S. 1026 (1975); *National Ass'n of Reg. Util. Comm'rs.* v. *FCC*, 423 U.S. 836 (1975).

[36] *E.g.*, *Washington Util. & Transp. Comm.* v. *FCC*, *supra*, 513 F. 2d 1142; *Bell Tel. Co. of Penn.* v. *FCC*, *supra*, 503 F. 2d 1250; *Microwave Communications, Inc.*, *supra*, 18 FCC 2d 953, 21 FCC 2d 190.

of the very sound competitive policies the FCC has carefully fostered with the approval of the courts.

The disruption and change almost necessarily would extend beyond the specialized carriers to domestic satellite carriers,[37] "value added" carriers with existing certificates,[38] and possibly the new "resale" carriers the FCC anticipates as a result of its recent policy decision on communications brokerage.[39] The FCC has limited or anticipates limiting these carriers in much the same manner as the specialized carriers—to the services they proposed, and, generally to private line services.

Finally, apart from the general policy of competition and the validity of existing grants, the decision would require significant changes in the FCC's certification procedures.[40] If it is not sufficient any more to consider applications on the basis of the proposed services without risking inadvertently broad certification, the FCC will have to adopt procedures that will produce a basis for deciding either to take a chance on open-ended grants or to limit the grants because the public interest affirmatively requires limits. This would slow the certification process immeasurably, might obviate broad policy proceedings such as the specialized common carrier inquiry, and almost certainly would not result in a better or more rational regulatory product.

The fact that the court of appeals remanded the case to the agency for further proceedings does not diminish the importance of obtaining review now. First, any proceeding of the kind the court envisions, to determine whether MTS competition would disserve the public interest, necessarily would take a great deal longer than the specialized common carrier proceeding which considered the narrower and less complex issue

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[37] See note 7, *supra*.

[38] See note 8, *supra*.

[39] *Regulatory Policies Concerning Resale and Shared Use*, note 8, *supra*.

[40] Under FCC regulations, an application for a Section 214 certificate must include, *inter alia*, a statement of "the nature and classification of the communication services to be provided (e.g. telephone, telegraph, facsimile, data, private line, voice, television relay etc.)." 47 C.F.R. § 63.01(e).

of private line competition. Second, it is not at all clear what the status of MCI and other specialized carriers would be in the meantime. If their authorizations, which had been thought limited to private line services, were challenged on grounds that the FCC had not considered the public interest in unlimited competition, the Ninth and Third Circuit decisions might not be dispositive. If their certificates were not valid, MCI and the other specialized carriers might have to stop operating until the FCC had completed its further task as described by the court of appeals.[41] Plainly, final review of this important regulatory matter is appropriate now to avoid the disruption and uncertainty that almost certainly would result if the Court stays its hand.

C. ERROR OF FEDERAL STATUTORY CONSTRUCTION

The court of appeals misconstrued and misapplied Section 214. The statute on its face authorizes the FCC to "issue such certificates as applied for"—which is just what the agency did in the case of MCI. The specialized carriers generally, and MCI in particular, never sought authorization beyond private line services. The FCC never considered whether competition was feasible or would serve the public interest in areas outside those proposed in the applications. It would have been wasteful of time and resources to consider questions that had not been asked—particularly such difficult questions as whether competition was desirable in the provision of long distance telephone service.[42]

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[41] Similarly, the FCC would have difficulty granting new applications for specialized common carrier certificates until this matter is settled. Understandably, the Commission may not want to issue more certificates until it can be certain what those certificates will authorize.

[42] The questions as to competition in public services are more difficult than those as to private line services. While the FCC on the record in *Specialized Common Carrier Services* could warrant benefits from private line competition and could be assured that the economic impact on established carriers was not sufficient to hurt their service to the public, a far different

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Section 214(c) plainly authorizes the FCC to limit or condition certificates in the public interest as well as to grant them "as applied for." But nowhere does the statute demand an "affirmative determination" that the public convenience and necessity require limits when the Commission is granting all that has been asked. Stated differently, nothing in Section 214 requires the FCC to grant more than the carrier has applied for.[43] The court of appeals recognized that "it is analytically impossible to determine the need for a new facility without considering the services to be provided over it." (App. A, p. 22a.) But its ruling in this case would, indirectly, perform the "analytically impossible" act of authorizing MCI to use facilities without FCC consideration of the services to be provided.

By focusing on Section 214(c), moreover, and requiring an "affirmative determination" that the public interest requires limitations, the court below ignored the command of Section 214(a) that the FCC grant only those certificates that the public convenience and necessity require.[44] In making the Section 214(a) determination, the FCC must consider the services

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(Continued)

record would have been required to make similar conclusions as to long distance toll service and WATS. The FCC simply did not reach those questions in light of the applications that prompted the rulemaking proceeding. See 47 C.F.R. § 63.01(e). As Mr. Justice Brandeis wrote, "The duty imposed on the Commission does not extend beyond the need for its action." *New England Division Case*, 261 U.S. 184, 201–02 (1923). An agency need decide only the "real controversy" before it; as to other matters, "there is no occasion for the Commission to act." *Id.*

[43] Indeed, Section 214(c), on which the court of appeals rested its decision, expressly gives the FCC several options as to the action it might properly take on applications. It may grant them "as applied for." It may grant them in part. It may attach such conditions as "in its judgment" the public convenience and necessity may require. And, of course, it may deny them.

[44] The court of appeals also discounted the FCC's authority under Section 303 (a) and (b) to "classify" microwave radio stations and to "prescribe the nature of the service" to be rendered by each class of stations. 47 U.S.C. § 303 (a) and (b). The FCC relied expressly on these provisions of the act in adopting its specialized carrier policy. 24 FCC 2d at 349; 29 FCC 2d at 941.

that are proposed. (App. A, p. 22a.)[45] It cannot be said that the FCC ever has determined whether the public convenience and necessity "require" unlimited operation of MCI's facilities—or even that the public convenience and necessity permit such operation. The court below, we submit, has inferred a requirement from subsection (c) that abrogates the express command of subsection (a); it has reversed the premise that underlies the certification procedure under Section 214.

The Third Circuit, deferring to the FCC's primary jurisdiction in a case involving just the kind of question that MCI raised in this case, held that the FCC was the appropriate agency, by statute as well as by experience, to make such decisions as whether competition should be authorized and to what extent. That court stated:

> Deferral to the FCC under the doctrine of primary jurisdiction is particularly appropriate in this case not simply because of the fact of uncertainty concerning the issue of what private line services have been authorized, but also because of the nature of the issue. For a court to resolve this issue results in a judicial determination of the scope of permissible competition between the specialized carriers, such as MCI, and the existing carriers, such as AT&T. Such a determination, involving, as it must, the comparative evaluation of complex technical, economic, and policy factors, as well as consideration of the public interest, should be made, in the first instance, by the administrative agency which has been entrusted with the primary responsibility for making such a determination and which has the expertise necessary for the development of sound regulatory policy.

MCI Communications Corp. v. *AT&T*, 496 F. 2d at 222. Instead of deferring to the FCC's construction of its own statute and policy, the court of appeals in this case has cut the founda-

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[45] See also *Network Project* v. *FCC*, 511 F. 2d 786, 793–94 (D.C. Cir. 1975) (approving the FCC's policy of open entry into the domestic satellite communications field for purposes of providing private line services).

tions from under considered agency policy on the basis of its own novel reading of a statute that has been in regulatory acts at least since 1920.[46] [47]

The court's rule would supplant forty years of consistent FCC interpretation and application of Section 214. The agency always has considered its function under that statute to include evaluating certificates "as applied for" and attaching conditions or limitations as "in its judgment" the public convenience and necessity may require. In the process, the FCC has created numerous classes of limited service carriers.[48] The agency's consistent practice under Section 214 provides an independent reason for this Court to review the decision below.

CONCLUSION

The Court should grant the writ of certiorari.

Respectfully submitted,

DANIEL M. ARMSTRONG,
Associate General Counsel.
JOHN E. INGLE,
Counsel.
Federal Communications Commission,
Washington, D.C. 20554.

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[46] Transportation Act of 1920, 41 Stat. 456, 49 U.S.C. 1 (18). The novelty of the court of appeals' reading is evident from the total absence of supporting authority from that part of its opinion. (App. A, pp. 20a–24a.)

[47] The court of appeals in this case appears to have denied the deference normally owed to agency interpretations of their own decisions because it disagreed with the agency as to how Section 214 should be read. (App. A, p. 28a & n. 67.) This ignores the fact that deference also is due to agency construction of its own organic statutes, particularly when the construction is consistent with past decisions and is rational. See *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969).

[48] See, *e.g.*, notes 8 & 9, *supra*. Compare *AT&T*, 27 FCC 113 (1959) (separation between voice and record communications functions in the international market). See also *Capital Telephone Co., Inc.* v. *FCC*, 498 F. 2d 734, 740 (D.C. Cir. 1974) ("When an applicant accepts a government permit which is subject to certain conditions, he cannot later assert alleged rights which the permit required him to surrender in order to receive it.").

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